Statute: Page

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V. Sec. 151, *et seq.*):

Sec. 7 6
Sec. 8 (1) 6, 7, 11
Sec. 8 (2) 7
Sec. 8 (5) 7

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1014

VALLEY MOULD AND IRON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. II, 23–36) is reported in 116 F. (2d) 760. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 734–778) are reported in 20 N. L. R. B., No. 18.

JURISDICTION

The decree of the court below (R. II, 68–70) was entered on February 5, 1941. The petition for a writ of certiorari was filed on May 2, 1941. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an employer may refuse to bargain collectively with a labor organization, duly certified by the Board in prior proceedings as the exclusive bargaining representative of the employees, upon the pretext that another labor organization has subsequently obtained a majority of the employees, where the Board's findings establish that the second labor organization is dominated by the employer.

2. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported the second labor organization in violation of Section 8 (1) and (2) of the Act.

3. Whether, in the circumstances of this case, the Board properly required petitioner to withdraw all recognition from and completely disestablish that labor organization as a bargaining representative of its employees.

4. Whether, upon finding that petitioner, in violation of Section 8 (1) of the Act, had changed the regular day off of an employee from Sunday to Tuesday because of his union membership and activities, the Board properly required petitioner to restore to the employee the privilege of taking his regular day off on Sunday.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix to the petition at pages 21–22.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. I, 734–778). The facts found by the Board and shown by the evidence may be summarized as follows:[1]

In 1933, petitioner established a conventional Employees' Representation Plan which admittedly became illegal upon the passage of the Act in 1935; petitioner nevertheless continued to maintain and support the Plan until after the April 1937 decisions of this Court sustaining the Act[2] (R. I, 739, 766–767; R. I, 116–119, 121, 284–288, 343–345, 499–509). Concurrently, when Lodge 1029, Amalgamated Association of Iron, Steel and Tin Workers of North America, affiliated with the C. I. O., sought to organize petitioner's employees in the spring of 1937, petitioner's ranking officials repeatedly questioned the president of Lodge 1029 concerning that organization, stated that membership therein was inconsistent with loyalty to peti-

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

tioner, and otherwise indicated their opposition to the affiliation of petitioner's employees with outside organizations (R. I, 740–742; R. I, 123–130).

On April 16, 1937, petitioner's vice president, Swab, assembled the Plan representatives and announced that the Supreme Court decisions made it necessary to discontinue the Plan; in the same speech he stated that the representatives could "continue to meet with your own little organization as you are," that "We will judge the future by the past, and trust that the future will be the same as in the past," and that "it didn't make sense to him why men should want to pay, have to pay dues to work, for the right to work, and why we should have outsiders coming in telling us what to do," and otherwise expressed his displeasure with Lodge 1029 (R. I, 742–743, 767–768; R. I, 119–122, 551–552). The Board found that Swab's statements clearly revealed to the employees petitioner's desire for the continuance of an organization similar to the Plan (R. I, 768).

On May 30, 1937, because it had been unable to obtain a collective-bargaining agreement with petitioner, Lodge 1029 called a strike which lasted until July 9, 1937 (R. I, 743, 768; R. I, 130–132, 293–300, R. II, 7–12). During the strike, a group of employees including two former Plan representatives and a supervisory employee organized an inside union called the Valley Mould Independent Employees Union (R. I, 768–769; R. I, 437–439, 443–445, 589–591, 120, 327–328, 341). Petitioner's su-

pervisory staff meanwhile solicited strikers to abandon Lodge 1029 and return to work, threatening some with loss of their jobs unless they did so (R. I, 743–744, 769; R. I, 195, 227, 237–240, 243–244, 252, 273–274, 278–279, 324); organizers of the Independent also attempted to break the strike (R. I, 769–770; R. I, 304–305, 445–447). The strike was settled after petitioner posted a "statement of policy" concerning working conditions which recognized Lodge 1029 as the representative of its members (R. I, 754; R. I, 132, 510–512).

Shortly after the termination of the strike, petitioner changed the regular day off of Cook, the president of Lodge 1029, from Sunday to Tuesday, expressly because of his union membership and activities (R. I, 744–745; R. I, 137–138).

On March 23, 1938, after Lodge 1029 was selected by a majority of the employees in an election conducted by the Board pursuant to Section 9 of the Act on February 18, 1938, the Board certified Lodge 1029 as exclusive bargaining agent of petitioner's employees in an appropriate unit (R. I, 751–752; R. I, 135–137). During the critical period preceding the election, foremen supported the Independent and opposed Lodge 1029 by statements identifying petitioner's interests with those of the Independent (R. I, 770–771, 745–746; R. I, 254–255, 265–266, 279–280).

After the certification of Lodge 1029, petitioner met with it for collective bargaining purposes on seven occasions between April 22 and August 19,

1938; throughout the "negotiations," petitioner refused to recognize Lodge 1029 as the exclusive bargaining representative of petitioner's employees, and further evidenced its lack of good faith bargaining by its dilatory tactics, failure to submit genuine counterproposals, refusal to enter into a signed agreement, and insistence that any agreement reached must be conditioned on the posting of a $200,000 bond by Lodge 1029 (R. I, 754–765; R. I, 160–193, 518–551, 576–587, R. II, 15–21). The Independent grasped petitioner's refusal to bargain with Lodge 1029 as a selling point in obtaining members for itself (R. I, 771; R. I, 450–452); petitioner's supervisory staff concurrently disparaged and inveighed against Lodge 1029 (R. I, 746–750, 765; R. I, 139–141, 232–233, 261, 268–270). At the last bargaining conference between petitioner and Lodge 1029 on August 19, 1938, petitioner advised the Lodge that the Independent had presented evidence showing that it then represented a majority of the employees, and that petitioner therefore was meeting with Lodge 1029 as the representative of its members only (R. I, 752, 762–763; R. I, 186–188, 585–587).

Upon the foregoing evidentiary findings, the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thus violating Section 8 (1) of the Act (R. I, 750–751, 772); had refused to bargain collectively with Lodge 1029 on each of the seven conference

dates and at all times thereafter, in violation of Section 8 (1) and (5) of the Act (R. I, 765–766, 772); and had dominated, interfered with, and supported the Independent in violation of Section 8 (1) and (2) of the Act (R. I, 772–773). The Board found further that any defections from Lodge 1029 to the Independent were the result of petitioner's unlawful refusals to bargain, and that designation by the employees of the company-dominated Independent did not represent the employees' free choice (R. I, 753, 764, 774).

The Board's order required petitioner to cease and desist from its unfair labor practices; to bargain collectively with Lodge 1029; to withdraw recognition from and disestablish the Independent; to restore to Cook his former privilege of taking his regular day off on Sundays; and to post notices (R. I, 776–778).

Thereafter, petitioner filed a petition in the court below to review and set aside the Board's order (R. I, 1–92). The Board answered, requesting enforcement of its order (R. I, 102–107). On December 17, 1940, the court handed down its opinion enforcing the Board's order, subject to the right of interested proper parties to seek a recertification and redetermination of the bargaining representative (R. II, 23–36). A petition for rehearing filed by petitioner (R. II, 39–47) was denied on January 31, 1941. On February 5, 1941, the court entered a decree in conformity with its opinion (R. II, 68–70).

ARGUMENT

1. Petitioner's primary contention is that it need not bargain with a representative of its employees, duly certified as such by the Board, where another organization (Independent) is said to have become the representative of a majority of its employees thereafter (Pet. 2–3, 12–15). However, it is clear that the question is not open for decision on this record, for the Board has found, and the court below agreed, that petitioner had dominated, interfered with, and supported Independent (R. I, 772–773, II, 32–36), with the consequence that Lodge 1029 has not in fact been supplanted by another organization which the Act recognizes as a representative of the employees. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453.

Moreover, the Board found that petitioner had unlawfully refused to bargain collectively with Lodge 1029 at the several conferences preceding August 19, before there was any contention of a shift to Independent, and that the alleged subsequent shift to Independent was a product of those violations (R. I, 753, 764, 774). Although the court below did not find it necessary to pass upon these findings, they are nevertheless fully supported (Statement, *supra*, pp. 5–7), and constitute

an additional reason for the enforcement of the Board's order, regardless of petitioner's contention. *International Association of Machinists* v. *National Labor Relations Board, supra.*

It is thus apparent that the question which petitioner seeks to raise is not in issue in this case and that the decision therefore cannot be in conflict, as asserted by petitioner (Pet. 12–13), either with *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585, or with *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474 (C. C. A. 5). Moreover, even if the issue were squarely presented, there would not be any conflict. The foregoing decisions merely hold that a representative selected by a majority must be recognized until its status is changed. The court below accepted that result, but ruled that the change in status must be evidenced by a new certification before the employer can ignore the representative previously selected by a majority of the employees. The reference of the court below to the necessity of additional proceedings before the Board for change in certification merely recognizes the only orderly method of establishing the existence of a change in status. Indeed, that statement by the court below is squarely in accord with the *Remington Rand* decision in which the court said the employer "must invoke an inquiry by the Labor Board" if it believes that a labor organization formerly certified by the Board no longer rep-

resents a majority of the employees, before it can refuse to treat with it. 94 F. (2d), at 870.[3] There is nothing in the *Whittier Mills* case to the contrary.

2. Petitioner's next contention (Pet. 3–4, 16–18), that there is no substantial evidence to sustain the Board's findings that petitioner dominated, interfered with, and supported the Independent, presents no question of general importance. Moreover, the evidence reviewed in the Statement (*supra,* pp. 3–6) affords full support for the challenged findings. Nor is there any conflict, as petitioner asserts (Pet. 16–18), with *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. (2d) 85 (C. C. A. 5); that decision turned, as does the present case, upon its particular facts.

3. Petitioner challenges next (Pet. 4, 18) the provisions of the Board's order directing petitioner to withdraw recognition from and completely disestablish the Independent as a bargaining representative of its employees. But the propriety of these provisions upon such findings as are here present, is well established. *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, and *H. J. Heinz Co.* v. *National Labor Relations*

[3] Cf. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 557, in which the decree approved by this Court required the carrier to recognize the Brotherhood until "by proper ballot" the employees selected another representative (24 F. (2d), at 434; 25 F. (2d), at 877–878).

Board, No. 73, this Term, both decided January 6, 1941; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261.

4. Petitioner's final contention (Pet. 4, 19), that the Board improperly ordered the restoration of Cook's former privilege of taking his regular day off on Sundays, is clearly without merit. Petitioner does not challenge the Board's findings and supporting evidence (R. I, 744–745; R. I, 137–138) upon which the order rests, i. e., that Cook was deprived of the Sunday privilege because of his union membership and activities, contrary to Section 8 (1) of the Act. The remedy directed by the Board simply "neutralizes" the illegal discrimination; it is precisely "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348; *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, this Term, decided April 28, 1941. Contrary to petitioner's assertion (Pet. 19), the order obviously does not deprive petitioner of managerial authority to make future changes in Cook's day off for nondiscriminatory reasons and on a nondiscriminatory basis; the order requires nothing more than that petitioner restore to Cook what it has discriminatorily taken from him.

CONCLUSION

The decision below is correct and does not present a conflict. The petition should be denied.

Respectfully submitted.

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MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941